

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E223 OF 2024

FINN GEORGE JAMBO ENTERPRISES LTD T/A

FG WHOLESALE 1ST APPELLANT

FINN AKINYI OKEWO 2ND APPELLANT

GEORGE OMONDI OUMA 3RD APPELLANT

- VERSUS -

SUCH ENTERPRISES LTD 1ST RESPONDENT

UPTAL PATEL 2ND RESPONDENT

JEFFERSON MBOYA T/A

YAMUKO AUCTIONEERS 3RD RESPONDENT

**(Being an appeal from the Ruling of Hon. F.M. Rashid PM delivered on the
2/10/2024 in Kisumu CMCC No. E117 of 2024, Finn George Jambo
Enterprises Ltd T/A FG Wholesale & 2 Others v Such Enterprises Ltd & 2
Others)**

J U D G M E N T

1. The appellants sued the respondents jointly for general and exemplary damages for trespass into their premises, compensation for illegally impounded goods worth **Kshs. 850,000/-** and **Kshs. 200,000/-** taken from the appellants' cashier drawer, reimbursement of overpaid amounts of **Kshs. 800,393/-** and loss of business and profits for seven (7) days totalling to **Kshs. 63,000/-**.

2. The trial commenced and on **12/8/2024**, the appellants called one witness who testified after which they closed their case. The respondents stated that they were not ready to proceed as they had brought no witnesses and further sought leave to file their witness statement. The trial court granted the respondents leave to file a witness statement and serve the appellants within 7 days. Further, it granted the appellants an opportunity to recall its witnesses in case the defence raised fresh issues.
3. On the **2/10/2024**, when the matter came up for hearing, the respondents stated that they were not ready to proceed with the hearing on account of having not complied with the trial court's directions of **12/8/2024** as they had filed their documents out of time and their witness was indisposed. The appellants therefore sought that the respondents' case be closed.
4. In its ruling made in open court, the trial court ordered as follows: -

“I have considered the submissions by both parties on record. Article 159 of the Constitution encourages the court to hear matters on merit. In this case, I direct that the defendants shall serve all the documents and statements to the Plaintiff by close of business today. The plaintiff, if need be, is granted chance to file any response within 14 days of service. The plaintiff, I reiterate is equally at

liberty to recall his witnesses if he is of the view that new issues have arisen. As the plaintiff was ready to proceed, he will have today's costs. Defence hearing on the 6/11/2024 by consent"

5. It is the aforesaid ruling that is the subject of this appeal. The appellants impugned the trial court's ruling vide a memorandum of appeal dated 28/10/2024 on the following eight (8) grounds, that: -

a) The learned trial magistrate erred in law and fact in allowing the respondents to sneak an altered and/or discretely amended defence and counterclaim dated 20/9/2024 on 2/10/2024 when there was a defence on record dated 17/5/2024 without application and/or leave of court, even long after the appellants had testified and closed the plaintiff's case and without any valid reason for the delay.

b) The learned trial magistrate erred in law and fact by subtly and indirectly reopening the appellant's case when the same had already been closed.

c) The learned trial magistrate erred in law and fact by allowing the respondents to file belatedly and inordinately so on 2/10/2024, their list of documents and witnesses and witness statement even after being granted leave to file them out of time after the plaintiffs had

testified and closed their case, in disobedience of a court order requiring them to be filed within 7 days of 12/8/2024 and without any valid reason for the delay from 22/3/2024.

- d) The learned trial magistrate erred in law and fact by abdicating the obligation and discretion of suo moto striking out pleadings that the prejudice, and delay fair trial of an action.*
- e) The learned trial magistrate erred in law and fact by finding and holding that Article 159 of the Constitution is a cure to each and every error or non-observance of express rules of procedure and ultimately ended up making a wrong decision.*
- f) The decision of the learned trial magistrate gravely abridged the appellants right to be heard and access justice.*
- g) The decision by the learned trial magistrate permitted and resulted in an abuse of the due process of the law to the detriment of the appellants.*
- h) Consequently, the learned magistrate's decision occasioned a miscarriage of justice.*

6. The parties agreed to dispose off the appeal by way of written submissions. The appellant submitted that the court never made any finding on the irregular amendment of defence, neither did it grant the respondents leave to file an Amended Defence.
7. That consequently, the proceedings were contrary to the Rules and portray a serious miscarriage of justice that the trial court ought not to have permitted as the amendment went to the root of the entire case and the respondents' enterprise was to steal a match against the appellants.
8. That the respondents' Amended Defence and Counterclaim was for striking out as the respondents had all the time to seek leave but chose not to.
9. That the trial court erroneously sought the cover of **Article 159 of the Constitution** to justify the abuse and bending of process. That however, that Article was never meant to overthrow or destroy rules of procedure but rather when there is an express rule of procedure, the same must be adhered to.
10. That the trial court was engaged in bending the rules that ended up favouring the respondents and unfairly harming the appellants thus denying them the right to be heard fairly and the right to access justice as provided for by the Constitution under **Articles 48 and 50**.

11. On their part, the respondents submitted that the appellants had approached the court with unclean hands in that, they were a beneficiary of the court's ruling through the said *Article 159 of the Constitution* as the respondents had sort for the dismissal of their entire suit on grounds that they filed their suit without paying the requisite court fees.
12. That the trial court had allowed the appellants to recall its witness and/or file any further documents that they wished to rely upon thus no prejudice would have been visited upon them.
13. That the trial court exercised its discretion by balancing the right to be heard for both parties and by not dismissing the appellants suit for failing to pay the requisite filing fees and allowing them to mend the said wrong whilst allowing the respondents to file their pleadings out of time.
14. Having carefully considered the entire record, the grounds of appeal may be summarized into one, whether the trial court wrongly exercised its discretion in its ruling of **2/10/2024**.
15. Before addressing this ground of appeal, it is imperative that the Court adverts to some issues that were raised by the appellant. The appellant raised issues that the trial court allowed the sneaking in of an amended defence and counter-claim. That is an issue that does not seem to have been raised by the

appellant before the trial court. As a result, the trial court did not address the same. The same cannot therefore be raised on appeal. The trial court ought to have been given the opportunity to consider the same before it can be raised here.

16. It is clear from the record that what was before the trial court was an application for adjournment by the respondents on twin grounds; that they had not complied with an earlier order to file and serve their documents and had filed them albeit out of time without leave and, that their witness was indisposed.
17. The trial court exercised its discretion, granted the adjournment, directed the respondents to file and serve all documents and statements by close of business that day. It further granted leave to the appellants to file any responses and recall their witnesses. The reason given by the trial court for exercising its discretion thus was that, under ***Article 159 of the Constitution***, courts are encouraged to shun technicalities and hear parties, where necessary on merit.
18. The question therefore is that, did the trial court exercise its discretion wrongly? Can this Court interfere with a trial court's exercise of discretion? The latitude of an appellate court to upset a lower court's exercise of

discretion is circumscribed. On this, the Supreme Court in Sirma v Independent Electoral and Boundaries Commission & 2 others [2019] KESC 64 (KLR), reiterated thus: -

“... we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the court’s exercise of discretion. ... On our part, we can only interfere with the appellate court’s exercise of discretion if the Appellant can show that:

i) The appellate court acted on a whim or that;

ii) Its decision is unreasonable and

iii) It is made in violation of any law or the Constitution or that;

iv) It is plainly wrong and has caused undue prejudice to one party.”

19. The Apex Court has spoken. An appellate court can only interfere with a lower court's exercise of discretion if that court acted on a whim or that; Its decision is unreasonable and it is made in violation of any law or the Constitution or that; it is plainly wrong and has caused undue prejudice to one party.
20. In its ruling of **2/10/2024**, the trial court allowed the respondents to file all their documents and statements before close of business on that day. Conversely, it allowed the appellants to file any responses thereto and to recall its witness, if it so wished.
21. It was never contended, and this Court sees none, that the trial court acted on a whim or that the decision was unreasonable. Further, there was no contention and the Court finds that the trial court did not breach any statute or Constitution. To the contrary, it not only cited and relied on a Constitutional provision, but also shielded the appellants from suffering any prejudice.
22. In essence, the trial court exercised its discretion by balancing the right to be heard for both parties. The said decision was reasonable and in line with the

Constitution in particular **Articles 50** on the right to a fair trial and **159(2) (d) of the Constitution** that gives courts the discretion to dispense justice without procedural technicalities. For the loss of time or the delay the appellants would suffer for its decision, the trial court awarded them the costs for the day. No prejudice was therefore suffered by the appellants as alleged.

23. Accordingly, in view of the foregoing, the Court finds the appeal to be without merit and dismisses the same with costs to the respondents.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 12th day of **February, 2026**.

A. MABEYA, FCI Arb

JUDGE